IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

DANKOF V. SHIFFERMILLER

MARY I. DANKOF, APPELLANT,
V.
ROGER L. SHIFFERMILLER, APPELLEE.

Filed April 6, 2010. No. A-09-672.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Affirmed.

Michael A. Nelsen, of Marks, Clare & Richards, L.L.C., for appellant.

James M. Bausch, Shawn D. Renner, and Mary Kay O'Connor, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee.

IRWIN, CARLSON, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

This case involves a legal malpractice action brought by Mary I. Dankof against her former attorney, Roger L. Shiffermiller. Dankof appeals from the entry of summary judgment in favor of Shiffermiller. We affirm.

BACKGROUND

In 1999, Dankof accepted a job in California practicing internal medicine as part of a joint venture between Tenet Health Care Corporation (Tenet) and Physicians Network Services (PNS), whereby Dankof would work with a mobile medical van service operated by PNS.

Dankof signed two contracts in relation to her employment. Dankof signed a relocation agreement with Tenet and an employment agreement with PNS. The Tenet contract included a 3-year commitment to practice internal medicine with Tenet and stated that Tenet would guarantee a monthly salary of $13,750 for 12 months, up to $165,000. The Tenet contract also

specified that if Dankof left her employment in less than 3 years, Dankof would repay Tenet all of the money that Tenet paid her. The PNS contract provided that Dankof would turn over to PNS all money she received from Tenet, and in turn, PNS would pay Dankof 73 percent of the money paid by Tenet, less payroll taxes.

Dankof testified that before signing the contracts, she had conversations with representatives of PNS and Tenet concerning the repayment provision in the Tenet contract. Dankof advised PNS and Tenet that she would not agree to employment under this condition as she was uncertain that she could fulfill the 3-year commitment. According to Dankof, PNS agreed to relieve her of the repayment obligation in her Tenet contract. The PNS contract included the provision at issue in this appeal, which states the "[p]arties agree that repayment of monies advanced by [Tenet] are responsibility of [PNS]." Tenet was not a party to the PNS contract.

Dankof left her employment in October 2000, before the end of the 3-year term. Dankof notified PNS that she would be leaving and that therefore PNS would have to repay Tenet pursuant to the PNS contract. PNS acknowledged that it was obligated to repay Tenet and requested that Dankof allow PNS to notify Tenet because PNS wanted the opportunity to negotiate the repayment amount with Tenet. Dankof left California with PNS' assurance that it would take care of the repayment to Tenet.

In July 2001, Tenet sent a demand letter to Dankof which notified her of her breach of the Tenet contract and demanded repayment. Dankof contacted PNS and notified it that she had received a demand letter from Tenet. PNS did not pay Tenet, and Tenet sued Dankof in Nebraska in December 2001.

Dankof hired Shiffermiller to represent her in the lawsuit filed by Tenet. Shiffermiller testified that he considered whether a third-party action could be brought against PNS to seek indemnification but concluded that there were not sufficient contacts between PNS and Nebraska to acquire personal jurisdiction over PNS. According to Shiffermiller, he determined that the provision in the PNS contract was an indemnity provision and that the statute of limitations for a claim against PNS pursuant to that provision would not accrue until Dankof paid Tenet. Shiffermiller discussed with Dankof the possibility of filing a complaint against PNS in California and advised Dankof that she could wait until the Tenet lawsuit was finished to pursue PNS; however, Shiffermiller did not specifically discuss the issue of the statute of limitations with Dankof. Dankof agreed to wait to pursue PNS. Summary judgment was entered in favor of Tenet, Dankof's appeal was unsuccessful, and Dankof paid the judgment of $198,323 to Tenet in July 2008.

Shiffermiller advised Dankof that he could not represent her in California in a case against PNS because he was not licensed in California, and Dankof hired another attorney. Dankof's new attorney advised her that he believed an action in California against PNS would be unsuccessful because he interpreted the provision in the PNS contract to be a guarantee and not an indemnity and as such the statute of limitations would bar an action against PNS. Pursuant to her attorney's advice, Dankof did not attempt to file a complaint against PNS in California.

Dankof filed this action against Shiffermiller for professional negligence. Dankof and Shiffermiller filed cross-motions for summary judgment alleging no genuine issue of any material fact. Dankof asserted that Shiffermiller was professionally negligent by failing to advise

her of the applicable statute of limitations on her claim against PNS and in failing to preserve and protect that claim. The district court denied Dankof's motion. Shiffermiller asserted that Dankof's claim against PNS was not barred by the statute of limitations and that therefore as a matter of law, he had not proximately caused damage to Dankof. More specifically, Shiffermiller argued that the repayment provision in the PNS contract was an indemnity provision and not a guarantee, and accordingly, the statute of limitations did not accrue on Dankof's indemnity claim against PNS until Dankof made payment to Tenet. The court granted Shiffermiller's motion, finding that the relevant provision in the PNS contract was an indemnity provision and that as such, the statute of limitations did not accrue until Dankof paid the judgment against her. For this reason, the court determined that Dankof did not suffer a loss that was the proximate cause of Shiffermiller's actions.

Dankof timely filed this appeal.

ASSIGNMENT OF ERROR

Dankoff assigns as error, restated, that the district erred in entering summary judgment in favor of Shiffermiller.

STANDARD OF REVIEW

Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and we give that party the benefit of all reasonable inferences deducible from the evidence. *Jardine v. McVey*, 276 Neb. 1023, 759 N.W.2d 690 (2009). In reviewing a question of law, an appellate court resolves the question independently of the lower court's conclusion. *Copple Constr. v. Columbia Nat. Ins. Co.*, 279 Neb. 60, 776 N.W.2d 503 (2009).

ANALYSIS

Dankof asserts that the district court erred in finding that her contract with PNS was an indemnity contract and not a guaranty contract, thereby finding that the statute of limitations had not yet expired and Shiffermiller had not committed legal malpractice. Dankof argues, and Shiffermiller does not dispute, that the question before us is whether, as a matter of law, the provision at issue is one of indemnity or guarantee. The parties agree that California law applies.

A plaintiff in a legal malpractice action has the burden to prove (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of damages to the client. *Bellino v. McGrath North*, 274 Neb. 130, 738 N.W.2d 434 (2007). Shiffermiller argues that the repayment provision in the PNS contract is an indemnity provision, the statute of limitations will not bar an action by Dankof against PNS, and as such, Shiffermiller has not proximately caused damage. Dankof contends that the provision is one of guarantee, and the applicable statute of limitations has run. The district court found as a matter of law that the repayment provision is an indemnity provision and also as a matter of law that the statute of limitations on an indemnity contract does not accrue

until an adverse judgment is paid. The district court held that the facts were undisputed as to when Dankof paid the Tenet judgment and that her claim against PNS was not yet barred by the statute of limitations.

Upon our independent review of the district court's conclusion, we agree that the repayment provision at issue is one of indemnification. The relevant provision in the PNS contract states: "Parties agree that repayment of monies advanced by [Tenet] are responsibility of [PNS]." While this sentence is in a paragraph titled "Guarantee," the bulk of the paragraph relates to the parties' understanding that Tenet would guarantee Dankof's monthly salary of $165,000 which would be turned over to PNS who would pay Dankof. California law recognizes that the legal nature of a provision is not conclusively determined by its title. See *First Securities Co. v. Storey*, 9 Cal. App. 2d 270, 49 P.2d 862 (1935) (word "guarantee" does not necessarily import contract of guaranty, but may import original obligation or promise). California law further provides that an "[i]ndemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person." Cal. Civ. Code § 2772 (West 2010). Similarly, Cal. Civ. Code § 2787 (West 2010) states that a "guarantor is one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefor."

The distinctions between a guarantee and an indemnity are illustrated by two California cases: *Somers v. U.S. Fidelity & Guaranty Co.*, 191 Cal. 542, 217 P. 746 (1923), and *Trust One Mortg. v. Invest America Mortg.*, 134 Cal. App. 4th 1302, 37 Cal. Rptr. 3d 83 (2005). In *Somers*, the court addressed a dispute regarding liability that arose after a tenant defaulted on an obligation to his landlord. The contract at issue involved a tenant, a landlord, and the tenant's surety. The issue before the court was whether the obligation was an indemnity or a guarantee. The court stated:

> "Contracts of indemnity are distinguishable from those of guaranty and suretyship in that in indemnity contracts the engagement is to make good and save another from loss upon some obligation which he has incurred or is about to incur to a third person, and is not, as in guaranty and suretyship, a promise to one to whom another is answerable." . . .
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> "The essential distinction between an indemnity contract and a contract of guaranty or suretyship is that the promisor in any indemnity contract undertakes to protect his promisee against loss or damage through a liability on the part of the latter to a third person, while the undertaking of a guarantor or surety is to protect the promisee against loss or damage through the failure of a third person to carry out his obligations to the promisee." . . .
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> Another distinction between the two is that the promise in an indemnity contract is an original and not a collateral undertaking . . . , while a contract of guaranty is a secondary and not a primary obligation, and can exist only where there is some principal or substantive liability to which it is collateral.
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> "If there is no primary liability on the part of the third person, either express or implied, that is, if there is no debt, default, or miscarriage, present or prospective, there is nothing to guarantee, and hence there can be no contract of guaranty."

Somers v. U.S. Fidelity & Guaranty Co., 191 Cal. at 547, 217 P. at 749 (citations omitted). Because the contract at issue provided for security against loss resulting from default in payment of rent, the court found that it was a contract of guarantee or suretyship.

In *Trust One Mortg. v. Invest America Mortg., supra*, Trust One Mortgage Corporation (Trust One), a mortgage lender, funded secured real estate loans brokered by Invest America Mortgage Corporation (Invest America). The two parties entered into an agreement which provided that Invest America would repay any losses that Trust One incurred as a result of deficiencies following foreclosure if a borrower defaulted within a certain timeframe. One of the issues in the case was whether the agreement was an indemnity or a guarantee. The court cited both "Civ.Code, § 2772" and "§ 2787" and stated, "A guarantor makes a direct promise to perform the principal's obligation in the event the principal fails to perform. An indemnitor does not make a direct promise to perform the principal's obligation, but promises to reimburse the indemnitee for losses suffered or to hold the indemnitee harmless." *Trust One Mortg. v. Invest America Mortg.*, 134 Cal. App. 4th at 1309, 37 Cal. Rptr. 3d at 88, 89. In holding that the agreement at issue was an indemnification, the court reasoned that the provision was not a direct promise by Invest America to perform the borrowers' obligations, but, rather, to indemnify and hold Trust One harmless from any losses resulting from the identified conditions. *Trust One Mortg. v. Invest America Mortg., supra*.

Pursuant to the guidance in these cases, a close reading of the provision at issue reveals that it is indeed an indemnity provision and not a guarantee. Only Dankof and PNS are parties to the PNS contract. The relevant provision provides that Dankof and PNS "agree that repayment of monies advanced by [Tenet] are responsibility of [PNS]." According to this provision, PNS was only responsible to Dankof in the event that she was required to repay money to Tenet. Therefore, PNS as the promisor promised to repay money advanced by Tenet on behalf of Dankof, the promisee. As was true in *Trust One Mortg.*, the provision was not a direct promise by PNS to perform Dankof's obligation to Tenet in the event that Dankof failed to perform, but, rather, to indemnify and hold Dankof harmless from the resulting loss. In other words, the promisor, PNS, undertook to protect its promisee, Dankof, against loss or damage through a liability on the part of Dankof to a third person, Tenet. See *Somers v. U.S. Fidelity & Guaranty Co., supra*. Further, because PNS' promise ran only to Dankof and not also to Tenet, the repayment provision is clearly an indemnification and not a guarantee.

Dankof next argues that even if the provision is one of indemnity and not guarantee, the applicable statute of limitations accrued when she became liable to Tenet rather than when she paid the judgment to Tenet. In our independent review of the district court's conclusion, we agree that the statute of limitations did not accrue until Dankof was required to pay the adverse judgment to Tenet in July 2008. California law holds that the statute of limitations does not accrue until the indemnitee suffers loss through payment of an adverse judgment or settlement. *City of San Diego v. U.S. Gypsum Co.*, 30 Cal. App. 4th 575, 35 Cal. Rptr. 2d 876 (1994). The California Supreme Court reasoned that one can only indemnify against claims that have been resolved against the indemnitee, i.e., those as to which the indemnitee has actually sustained liability or paid damages; "[i]ndemnification, after all, is the act of saving another from the legal *consequence* of an act. (§ 2772.)" *Crawford v. Weather Shield Mfg. Inc.*, 44 Cal. 4th 541, 559, 187 P.3d 424, 435, 79 Cal. Rptr. 3d 721, 734 (2008) (emphasis in original). The parties do not

dispute that Dankof paid the judgment to Tenet in July 2008. Pursuant to Cal. Civ. Proc. Code § 337 (West 2006), there is a 4-year statute of limitations on an obligation or liability contained in a written contract; therefore, the statute of limitations accrued when Dankof paid the judgment in July 2008 and runs for 4 years until July 2012.

Finally, in its order granting Shiffermiller's motion for summary judgment, the district court determined that Shiffermiller's actions have not proximately caused damage to Dankof because said actions had not barred her from bringing suit against PNS where the statute of limitations had not yet run on Dankof's claim against PNS. Dankof argues that *Black v. Shultz*, 530 F.3d 702 (2008), allows her to recover for damages proximately caused by Shiffermiller's failure to give competent legal advice. The *Black* court acknowledged that malpractice claims can, and often do, involve damages proximately caused by an attorney's failure to give competent legal advice. In *Black*, the court found that although the plaintiff's underlying claim against her employer for harassment (which claim the defendant did not prosecute and which was the basis for the plaintiff's retention of the defendant) had no merit, the defendant's negligent advice in the harassment case proximately caused the plaintiff to suffer $160,000 in other damages which were unrelated to damages which may have been recoverable in the harassment case. *Black* is distinguishable from the present case because here, Dankof asserts no damages proximately resulting from her reasonable reliance on Shiffermiller's legal advice other than her claim for damages--the amount she was required to repay Tenet--that PNS contracted to indemnify. Because we conclude that Dankof was not barred from pursuing her indemnification claim against PNS, we also must conclude that Dankof has not proved that Shiffermiller's advice (or lack thereof) proximately caused the damages she claims. Accordingly, we conclude that the district court properly granted Shiffermiller's motion for summary judgment.

CONCLUSION

For the foregoing reasons, we conclude that the district court properly granted Shiffermiller's motion for summary judgment. Accordingly, we affirm.

AFFIRMED.